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COURT OF CRIMINAL APPEALS
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In the
Court of Criminal Appeals of Texas
At Austin

No. 1524656
In the 182nd District Court
Of Harris County, Texas

ROBERT EARL HART
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S BRIEF FOR DISCRETIONARY REVIEW

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IDENTIFICATION OF THE PARTIES

Pursuant to Texas Rule of Appellate Procedure 38.2(a)(1)(A), a complete list of the names of all interested parties is provided below.

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PRESIDING JUDGE:

Hon. Danilo Lacayo
182nd District Court
Harris County, Texas

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STATEMENT OF THE CASE

Appellant was charged with the first-degree felony offense of murder. (C.R. 11). Following a jury trial, appellant was convicted of the charged offense and sentenced to thirty years of imprisonment in the Institutional Division of the Texas Department of Criminal Justice. (C.R. 97, 106). Appellant appealed his conviction, arguing that his trial attorney was ineffective for failing to request an instruction on sudden passion at the punishment phase of trial. The Fourteenth Court of Appeals reversed the conviction and remanded the case to the trial court for a new punishment hearing.

STATEMENT OF PROCEDURAL HISTORY

On May 13, 2021, a majority panel of the Fourteenth Court of Appeals issued a published opinion affirming the portion of the judgment regarding appellant's conviction, reversing the portion of the judgment of the trial court regarding punishment, and remanding the case to the trial court for a new punishment hearing. *Hart v. State*, 631 S.W.3d 458 (Tex. App.—Houston [14th Dist.] 2021, pet. granted). A published dissenting opinion was authored by Justice Wise.

On June 28, 2021, the State filed a motion for en banc reconsideration. The court of appeals denied the motion for en banc reconsideration on September 16, 2021.

The State filed a petition for discretionary review, which was granted on January 12, 2022.

GROUNDS FOR REVIEW

1. The majority opinion improperly fails to defer to the strong presumption that trial counsel's decision not to pursue a sudden passion instruction fell within the wide range of reasonably professional assistance.

2. The majority opinion's harm analysis improperly disregards the impact of the jury's rejection of appellant's theory of self-defense on the probability that the jury would find in his favor on the issue of sudden passion.

STATEMENT OF FACTS

The complainant began dating the appellant's daughter Stephanie during the months leading up to the charged offense. Stephanie quickly moved in with the complainant, but their relationship was volatile and Stephanie attempted to end the relationship several times. (V R.R. 39-40, 51).[1]

On the day before the shooting, Stephanie spent the night at her parents' home. (V R.R. 60). The Hart family was having lunch the following day when the complainant arrived at the home uninvited and parked his rental vehicle across the street. (V R.R.

[1] Stephanie's testimony suggests that, at some point before the offense occurred, she and the complainant had fought, and she left with nothing. (V R.R. 56). However, text messages sent from Stephanie to the complainant at the time of the offense expressing her love for him indicate that their romantic relationship was still ongoing. (IV R.R. 141); (VIII R.R. SX 74).

61-62). The family was alerted to the complainant's arrival because they had multiple surveillance cameras posted outside the home. (V R.R. 61).

The complainant got out of the car, removed his shirt, and began smoking a cigarette near the open driver's side door. (VIII R.R. SX 76). Appellant confronted the complainant with a gun. *Id.* A brief verbal exchange occurred before appellant aimed the gun at the complainant and opened fire, striking the complainant repeatedly. *Id.* Appellant continued shooting at the complainant as the complainant ran and ducked for cover behind the rental car. *Id.* Moments later the complainant collapsed to the ground and ceased moving. *Id.* He had been shot six times, including two gunshot wounds to the back. (V R.R. 14, 21, 24; VIII R.R. SX 5).

Immediately after the complainant collapsed, appellant approached his body, removed a second gun from his own pocket, fired it once into the distance, and then planted the gun in the complainant's lifeless hand. (VIII R.R. SX 76).

Appellant later told law enforcement officers that he had warned the complainant to leave the premises. (VIII R.R. SX 77). Appellant claimed that he heard what he believed was a gunshot, so he returned fire several times. (IV R.R. 75, 82; VIII R.R. SX 77). Appellant further claimed that he saw a weapon in the complainant's hand after the shooting. (IV R.R. 76).

Appellant also told law enforcement officers that the surveillance cameras posted outside his home were merely "dummy cameras" that did not record. *Id.* The police discovered that the surveillance cameras were, in fact, operational after appellant's wife

provided written consent to search the home. (IV R.R. 29, 39-40). The police recovered the recorded surveillance footage, which showed Appellant gunning down the unarmed complainant and then staging the scene to support a claim of self-defense. (IV R.R. 54, 61); (VIII R.R. SX 76). When the police informed Appellant that they had seen footage of the incident, Appellant invoked his right to counsel. (VIII R.R. SX 77). Appellant was ultimately charged with first-degree murder.

At the conclusion of trial, the jury rejected appellant's claim of self-defense and convicted him of murder. During the charge conference at the punishment phase of trial, appellant's trial counsel opted not to seek an instruction on sudden passion:

> THE COURT: Okay, so I'm reading the jury charge with respect to the punishment phase of trial. And I proposed a - - just for proposals - - a special issue regarding sudden passion, adequate cause sudden passion. And Mr. Dixon, you are telling me that you do not want that in there. As you've discussed with the State, you don't believe the facts support it; is that correct?
>
> MR. DIXON: That is correct, Judge. I went through about six pieces of case law, and there was one that was directly on point and it just - - it wasn't supported by the facts.
>
> THE COURT: So, I'm going to take out the sudden passion part out of it. And other than that, do you have any - - have you had an opportunity to read the charge yet?
>
> MR. DIXON: Yes. I read it yesterday, Judge.
>
> THE COURT: Is there any objections, additions, subtractions?
>
> THE STATE: Not from the State.
>
> MR. DIXON: Not from the defense.

(VII R.R. 5-6).

On appeal, a majority panel of the Fourteenth Court of Appeals held that appellant's trial counsel had requested the "removal" of the sudden passion instruction from the jury charge despite evidence supporting such an instruction. *See Hart v. State*, 631 S.W.3d 458, 464 (Tex. App.—Houston [14th Dist.] 2021, pet. granted). The majority panel reasoned that counsel's subjective belief that his client was not entitled to a sudden passion instruction could not form the basis for a sound trial strategy; therefore, it was objectively unreasonable for counsel to seek removal of the instruction from the charge. *Id.* at 466.

SUMMARY OF THE ARGUMENT

The panel majority denounced Appellant's trial attorney as ineffective for choosing not to request the inclusion of a sudden passion instruction in the jury charge at the punishment phase of trial. The panel majority reached this conclusion despite the absence of a record sufficiently developed to show that no legitimate basis existed to support trial counsel's decision. The majority failed to defer to the strong presumption that trial counsel's performance falls within the wide range of reasonably professional assistance. And by holding that reasonably professional counsel *must* request an instruction on sudden passion when some evidence raises the issue, the

majority opinion improperly divested counsel of any discretion to pursue one mitigating theory over another.

The majority panel further erred in its harm analysis by concluding that Appellant was prejudiced by trial counsel's failure to pursue a sudden passion instruction without taking into consideration the weakness of the evidence supporting sudden passion or the impact of the jury's rejection of appellant's theory of self-defense on the probability that a rational trier of fact would have found in appellant's favor on the issue of sudden passion.

ARGUMENT AND AUTHORITIES

I. The majority opinion improperly fails to defer to the strong presumption that trial counsel's decision not to pursue a sudden passion instruction fell within the wide range of reasonably professional assistance.

An appellate court's review of trial counsel's performance must be highly deferential, and the reviewing court must indulge "a strong presumption that counsel's conduct fell within a wide range of reasonable representation." *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005). The reviewing court will "rarely be in a position on direct appeal to fairly evaluate the merits of an ineffective assistance claim" because in "the majority of cases, the record on direct appeal is undeveloped and cannot adequately reflect the motives behind trial counsel's actions." *Id.* (quoting *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001)). Trial counsel "should ordinarily be afforded

an opportunity to explain his actions before being denounced as ineffective." *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003).

i. Trial counsel was not afforded a meaningful opportunity to defend his strategic decisions before being denounced as ineffective.

Here, trial counsel was not given an adequate opportunity to explain his reasoning. The record of counsel's reasoning is limited to his succinct assertion at the charge conference that a sudden passion instruction was not supported by the facts. (VII R.R. 5). The majority opinion improperly presumes that trial counsel did not possess a strategic reason for declining to pursue a sudden passion instruction. "The reasonableness of counsel's choices often involves facts that do not appear in the appellate record." *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). The reviewing court "commonly will assume a strategic motivation if any can possibly be imagined." *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001) (quoting 3 W. LaFave, et al., *Criminal Procedure* § 11.10(c) (2d ed. 1999)). Considering that the record on appeal has not been sufficiently developed to reflect the motives behind counsel's actions, the majority panel should have deferred to the strong presumption that counsel's decision fell within the wide range of reasonable professional assistance. *See Rylander*, 101 S.W.3d at 110-11 (refusing to denounce trial counsel as ineffective where counsel had not been provided a meaningful opportunity to explain his actions and the record on direct appeal was not sufficiently developed to show that counsel's performance was objectively deficient).

ii. The majority opinion undermines trial counsel's ability to make strategic decisions.

Additionally, the dissent correctly observes that the majority opinion's analysis is limited solely to whether appellant was entitled to an instruction, and fails to address whether counsel may have strategically decided not to pursue the theory of sudden passion. *See Hart*, 631 S.W.3d at 469-70 (Wise, J., dissenting). "[J]ust because a competent defense attorney recognizes that a particular defense *might* be available to a particular offense, he or she could also decide it would be inappropriate to propound such a defense in a given case." *Id.* (quoting *Okonkwo v. State*, 398 S.W.3d 689, 697 (Tex. Crim. App. 2013) (emphasis in original)).

Under these circumstances, a reasonably competent defense attorney could have strategically opted not to seek an instruction on sudden passion. If the trial court had submitted an instruction, it would have been the appellant's burden to prove sudden passion by a preponderance of the evidence. *See Rios v. State*, 990 S.W.2d 382, 386 (Tex. App.—Amarillo 1999, no pet.). To be entitled to an instruction on sudden passion, there must be some evidence "that there was an adequate provocation, that a passion or an emotion such as fear, terror, anger, rage, or resentment existed, that the homicide occurred while the passion still existed and before there was reasonable opportunity for the passion to cool; and that there was a causal connection between the provocation,

the passion, and the homicide." *McKinney v. State*, 179 S.W.3d 565, 569 (Tex. Crim. App. 2005).[2]

The evidence supporting a finding of sudden passion was weak and would likely have been discredited by the jury. Notably, there was no testimony from the appellant that he was under the influence of extreme emotion at the time of the shooting. Moreover, most of the evidence of provocation relied upon by the majority occurred well before the time of the murder. Sudden passion must be directly caused by and arise out of provocation by the deceased "*at the time of the offense*." TEX. PENAL CODE § 19.02(a)(2) (emphasis added).[3]

The record reflects that the provocation by the complainant at the time of the offense was nominal. The complainant arrived at the Hart residence, where he was not welcome, and parked on the opposite side of the street. *See* (VIII R.R. SX 76). Then he

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[2] The majority opinion characterizes trial counsel's actions as "seeking the removal of the instruction from the jury charge." *See Hart*, 631 S.W.3d at 466. The majority mistakenly presupposes that, absent counsel's deficient performance in seeking the removal of the instruction, the trial court "would have submitted a sudden-passion instruction." *Id.* at 467. However, the record reflects that the trial judge included the instruction merely as a "proposal." (VII R.R. 5). Presumably, if trial counsel had requested a sudden passion instruction, he would have been required to articulate facts showing adequate provocation.

[3] In finding some evidence of sudden passion, the majority opinion relies on Stephanie's testimony that appellant was aware of the complainant's violent nature, that he had previously seen marks of physical abuse on her, and that appellant had seen threatening text messages sent by the complainant to his wife days before the shooting. *See Hart*, 631 S.W.3d at 465. Although this behavior may have provoked appellant, it was provocation that began well in advance of the time of the offense, and therefore did not provoke *sudden* passion. *See Hobson v. State*, 644 S.W.2d 473, 478 (Tex. Crim. App. 1983) (holding that a father's concern over his daughter's relationship with the victim began the day before the offense occurred when the victim was released from jail; therefore, the passion that gripped the father when he stabbed the victim to death did not arise at the time of the offense).

got out of the car, removed his shirt, and began smoking a cigarette. *Id.* The appellant came outside with a gun, confronted the complainant, and a verbal exchange ensued. *Id.*; (V R.R. 63-64). Then the appellant pointed the gun at the complainant and fired repeatedly as the complainant attempted to run for cover behind his car. (VII R.R. SX 76).

Even assuming that *some* evidence exists which entitled appellant to a sudden passion instruction, reasonably professional trial counsel could nevertheless have believed that the jury would not have found the complainant's conduct at the time of the offense to be particularly provocative. A rational trier of fact would likely have concluded that a reasonable person under the same circumstances would not have been so enraged or terrorized by the complainant's unwanted presence that—rather than simply calling the police—he would have retrieved a gun, left the safety of his home, and repeatedly fired a gun at an unarmed person.

The record further suggests that counsel strategically rejected the theory of sudden passion in favor of a mitigating theory that was better supported by the evidence. As noted by the dissent, defense counsel did not attempt to convince the jury that appellant shot the victim in a fit of sudden passion, but instead portrayed appellant "as a considerate family-man who wanted to protect his daughter from a persistent problematic boyfriend." *Hart*, 631 S.W.3d at 470 (Wise, J., dissenting).

Appellant's trial counsel presented multiple character witnesses at punishment who described appellant as a "calm," non-violent "family man" who loved and

protected his family. (VI R.R. 9, 10; VII R.R. 8-9, 12, 14, 18, 20). During closing arguments, counsel urged the jury to assess a lenient sentence because the appellant was a protective father who simply wanted to put an end to his daughter's ongoing abuse:

> I wanted today to give you a little bit of insight into who Robert Hart is to help you make your decision on punishment. For 59 years Robert Hart has been relatively trouble free. For 40 years he's been married, 38 years he's been a father.
>
> You heard several people up there say Robert protects his family. May not be considered - - what he did may not legally be considered defending, but it's certainly protecting.
>
> Mr. Ray hounded his daughter. He terrorized her. He abused her.
>
> He'd had enough. I get it. I'm a dad.

(VII R.R. 22-23).

Counsel also presented testimony from Stephanie at the guilt-innocence phase of trial that the complainant had been stalking her over a long period of time, that she had attempted to end her relationship with him several times, and that she had unsuccessfully sought protective orders and restraining orders against him. (V R.R. 48-51, 62). Given the evidence of the ongoing nature of the conflict between the complainant and Appellant's daughter, it was not objectively unreasonable for trial counsel to paint a sympathetic picture of appellant as a protective father who was determined to put an end to a recurring problem, rather than as a man who was suddenly provoked to extreme rage or terror. *See Okonkwo v. State*, 398 S.W.3d 689, 697 (Tex. Crim. App. 2013) (concluding that trial counsel was not ineffective for failing to

request an instruction on mistake of fact where that theory was inconsistent with a theory advanced by counsel at trial).

In addition, the evidence supporting sudden passion was contradicted by surveillance footage which showed appellant approach the complainant, point the gun directly at him, and steadily aim the gun for several seconds before systematically opening fire. *See* (VIII R.R. SX 76). Within ten seconds after the complainant fell to the pavement, the surveillance video shows the appellant calmly placing a gun in the complainant's hand in an apparent attempt to stage a claim of self-defense. *See id.*

Considering that the jury had already rejected appellant's claims of self-defense and defense of a third person at the guilt-innocence phase of trial, defense counsel could have reasonably presumed the jury would likewise be unsympathetic to an argument that the victim's conduct at the time of the offense was so provocative that Appellant was suddenly overcome by a fit of passion. *See Wooten v. State*, 400 S.W.3d 601, 608 (Tex. Crim. App. 2013) (finding that the defendant was not harmed by the absence of a sudden passion instruction because it was highly improbable that the jury, having already rejected the theory of self-defense, would nevertheless believe that the defendant was so overcome by fear that he lost control).

Courts are prohibited from interfering "in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Counsel is not generally obligated "to request jury instructions on every issue raised by the evidence just for the sake of doing so."

Dannhaus v. State, 928 S.W.2d 81, 86 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). "Rather, counsel is under no duty to raise every defense available, so long as counsel presents a defense that is objectively reasonable or strategically sound." *See id.* (holding that counsel was not ineffective for failing to seek jury instructions on self-defense, mistake of fact, and voluntary conduct where the evidence to support those theories was not strong and counsel chose instead to focus the jury's attention on the lack of intent).

Thus, the majority opinion erred in concluding that counsel's decision not to seek a sudden passion instruction could not have been motivated by sound trial strategy. *See Rios*, 990 S.W.2d at 386 (refusing to denounce counsel as ineffective in the absence of proof as to counsel's reasons for not requesting a sudden passion instruction where the evidence supporting such an instruction was "internally inconsistent"). By removing from trial counsel the option to choose whether to pursue sudden passion as a mitigating theory, the appellate court oversteps its authority and effectively "eviscerates any discretion that seasoned criminal defense attorneys may exercise to pursue one defensive strategy over another." *Hart*, 631 S.W.3d at 469 (Wise, J., dissenting).

II. The majority opinion's harm analysis improperly disregards the impact of the jury's rejection of appellant's theory of self-defense on the probability that the jury would find in his favor on the issue of sudden passion.

The majority opinion further erred by holding that appellant was prejudiced by his attorney's failure to request a sudden passion instruction. *See Hart*, 631 S.W.3d at 469. To establish prejudice, appellant was required to show there was a reasonable

probability that, but for counsel's failure to request the instruction, the jury would have assessed a more lenient sentence. *See Ex parte Rogers*, 369 S.W.3d 858, 864 (Tex. Crim. App. 2013). Merely showing that trial counsel's failure had "some conceivable effect on the outcome of the punishment assessed" is insufficient. *Id.* at 863 (citing *Strickland*, 466 U.S. at 693); *see also Newkirk v. State*, 506 S.W.3d 188, 198 (Tex. App.—Texarkana 2016, no pet.) (to establish prejudice, it is not enough to show that the submission of a sudden passion instruction would have given the jury another sentencing option).

The majority opinion relies on this Court's analysis in *Trevino v. State*, 100 S.W.3d 232 (Tex. Crim. App. 2003) to support its conclusion that the jury would likely have believed that appellant acted under the influence of sudden passion. In that case, the State presented evidence that the defendant shot his wife three times and then staged the scene to make it appear as though he acted in self-defense. The defense claimed that the shooting was accidental and that Trevino acted in self-defense. The jury was instructed on accident and self-defense, but it rejected those theories and convicted the defendant of murder.

At the punishment phase of trial, the court refused to submit a requested instruction on sudden passion, and the jury assessed a sixty-year sentence. This Court found the absence of a sudden passion instruction to be harmful because the evidence of "staging" by Trevino would not necessarily have precluded the jury from finding that he killed his wife in a fit of sudden passion and then staged the crime scene afterwards. *See Trevino*, 100 S.W.3d at 242-43.

The majority finds the outcome in *Trevino* to be controlling here:

> Just as in *Trevino*, Hart shot a person with whom he was familiar and with whom he had an acrimonious history. Like the facts of *Trevino*, the evidence at the crime scene and in the video did not support a self-defense claim. And just as the jury in *Trevino* could have found appellant shot his wife under the immediate influence of a sudden passion, the jury here could have found that Hart acted, or overreacted, in a sudden passion in attempting to protect his family.

Hart, 631 S.W.3d at 468.

The majority's reliance upon *Trevino* is misplaced because there was plausible evidence in that case from which a jury could have rejected self-defense yet still reasonably found that the defendant was provoked to act under a sudden passion. A heated argument took place between the victim and Trevino after the victim confronted him with the phone numbers of other women she found in his wallet. The victim fired a gun at Trevino, and a physical struggle ensued. *See McKinney v. State*, 179 S.W.3d 565, 569-70 (Tex. Crim. App. 2005) (distinguishing the victim's conduct in *Trevino*, which rose to the level of adequate cause, from mere verbal taunting and physical pushing). In addition to the evidence of provocation by the victim, there was evidence that Trevino was under the influence of extreme emotion when law enforcement arrived at the scene. *See Trevino*, 100 S.W.3d at 233 (Trevino was "freaking out," he sounded "scared and panicked," he was "upset and crying," he appeared to be "extremely upset," and he was "pacing").

Unlike *Trevino*, the complainant's conduct at the time of the offense was not sufficiently provocative to give rise to adequate cause. "Adequate cause" is defined as

"cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." TEX. PENAL CODE § 19.02(a)(1). The jury viewed surveillance video showing that the only provocation arising at the time of the offense was the complainant's unwanted presence across the street from appellant's home and an ensuing verbal altercation.

Moreover, there was scant evidence indicating that appellant was under the immediate influence of sudden passion. Although the shooting took place shortly after the complainant's arrival, appellant did not appear to be agitated at the time of the offense. The surveillance video shows appellant advancing steadily to the edge of the property and pausing momentarily before aiming the gun and methodically opening fire. *See* (VIII R.R. SX 76). Afterwards, appellant appeared unperturbed as he staged the scene. *Id.*

Notably, appellant did not testify that he was overcome by anger or fear at the time of the offense, nor did he make any such claim in his statements to law enforcement. And unlike *Trevino*, there was no witness testimony describing appellant as scared or distressed. To the contrary, law enforcement officers arriving on the scene after the shooting described appellant's demeanor as "calm" and "composed." (IV R.R. 28). Considering the weak nature of the evidence supporting a sudden passion instruction, there was a diminished probability that the jury would have found that appellant was provoked to a fit of sudden passion.

The instant case is more analogous to *Wooten v. State*, 400 S.W.3d 601 (Tex. Crim. App. 2013). Wooten claimed that he got into an argument with the victim, the victim threatened to kill him, a firefight commenced, and he shot the victim in self-defense. *Id.* at 603. The jury was instructed on self-defense, but did not receive an instruction on sudden passion. The jury convicted Wooten of murder and assessed a sixty-year sentence.

In its harm analysis, this Court considered how the jury's rejection of self-defense affected the likelihood that the jury would have found in favor of Wooten on the issue of sudden passion. This Court reasoned that the jury's rejection of self-defense was indicative of a lack of harm:

> But a jury that had already discredited the appellant's claim that he reasonably believed deadly force to be immediately necessary would be unlikely to believe that, at the time the appellant first fired, he was actually experiencing a level of fear that caused him to lose control. Moreover, even had the jury believed that the appellant subjectively experienced such a level of fear, it would not likely have found that [the complainant's] behavior presented a provocation adequate to produce such a degree of fear in a man of ordinary temperament. Based on the record and evidence before us, it is exceedingly unlikely that the appellant suffered "some harm" as a result of the trial court's failure to give the jury a sudden passion instruction based on the appellant's assertion that terror or fear controlled his actions.
>
> *Id.* at 609-10.

The majority opinion erroneously rejects *Wooten's* harm analysis, positing that, unlike *Wooten*, "the determination made by the jury here did not turn on Hart's credibility, as he did not testify at trial and there was video evidence of the interaction

between Hart and Ray." *Hart*, 631 S.W.3d at 648. These distinctions do not render *Wooten's* harm analysis inapplicable. Although appellant did not testify at trial, the success of his self-defense theory depended on the credibility of his statements to law enforcement that he fired his gun only after Ray pointed a gun at him, that he heard Ray fire the first shot, and that he saw a gun in Ray's hand. (IV R.R. 115; VIII R.R. SX 77). If the jury had believed these statements, an acquittal would almost certainly have resulted. But significantly, the jury rejected appellant's claims that he was justified in using deadly force in defense of himself or a third person.

The majority postulates that "just as the jury in *Trevino* could have found appellant shot his wife under the immediate influence of a sudden passion, the jury here could have found that Hart acted, or overreacted, in a sudden passion in attempting to protect his family." *Hart*, 631 S.W.3d at 468. Considering that the jury did not believe that appellant acted justifiably in self-defense or defense of a third person, it is exceedingly improbable that the jury would have been persuaded that appellant was overcome by a sudden passion in attempting to protect his family. "If, except in a 'rare instance,' the same evidence raising a fact issue on self-defense also raises an issue on 'sudden passion,' then it must also be true that, except in rare instances, when the State's evidence is sufficient to overcome a claim of self-defense, it will also be sufficient to show the absence of sudden passion." *Chavez v. State*, 6 S.W.3d 56, 65 (Tex. App.—San Antonio 1999, pet. ref'd) (quoting *Benavides v. State*, 992 S.W.2d 511, 525 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd)).

Moreover, the surveillance footage of the shooting makes it significantly *less* probable that the jury would have found the victim's conduct at the time of the offense adequate to produce such passion in a person of ordinary temper. The video does not show any particularly threatening or provocative behavior by the complainant upon arriving at the scene. Instead, the surveillance footage captures the appellant's wildly disproportionate reaction to the complainant's presence. Appellant fired continuously at the complainant even as he ran for cover, striking him six times. *See* (VIII R.R. SX 76).[4] Based on this evidence, the jury likely would have concluded that a person of ordinary temper would not have been so terrorized or enraged by the complainant's presence that he would have responded by gunning down an unarmed man.[5]

Thus, under the harm analysis set forth in *Wooten*, appellant has not shown a reasonable probability that the jury would have assessed a more lenient sentence if counsel had sought and received a sudden passion instruction. The majority erred by refusing to consider the impact of the surveillance footage or the jury's rejection of

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[4] The surveillance footage also captures the reactions of appellant's family members, which belie the majority's conclusion that a person of ordinary temper would have been provoked to violence. When appellant opens fire upon the complainant, his wife Elizabeth attempts to intervene by whacking appellant with her cane. *See* (VIII R.R. SX 76). Appellant's daughter also appears to be in a state of visible agitation and distress, not for her own safety, but out of concern for the complainant. *See id.*

[5] The jury could also have inferred that appellant was predisposed to respond violently to anyone he perceived as a trespasser. In addition to having multiple surveillance cameras positioned around the property, appellant had signs posted next to the front door of the residence stating "No Trespassing We're Tired Of Hiding The Bodies" and "Is There Life After Death? Trespass And Find Out . . ." (IV R.R. 128); (VIII R.R. SX 45, 46).

self-defense on the probability that the jury would have found in appellant's favor on the issue of sudden passion.

PRAYER FOR RELIEF

The State prays that this Court will reverse that portion of the judgment of the court of appeals which reversed the trial court's judgment as to punishment and remanded the case to the trial court to conduct a new punishment hearing.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies in compliance with Texas Rule of Appellate Procedure 9.4(i)(3) that the foregoing petition for discretion review contains 5,168 words, as represented by the word-processing program used to create the document.

This document complies with the typeface requirements in Rule 9.4(e), as it is printed in a conventional 14-point typeface with footnotes in a 12-point typeface.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been submitted for service by e-filing to the following address:

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